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Toralf Mueller v Alcim Holding Sdn Bhd & Ors

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HIGH COURT (KUALA LUMPUR) — SUIT NO 26NCC-71–04 OF 2012
WONG CHEE LIN JC
7 JUNE 2018

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Damages — Assessment — Appeal against assessment — Oppressive proceeding — Petitioner claimed damages for oppression against respondents — Whether petitioner had to prove damages and losses suffered — Whether petitioner could claim for his shares in company — Whether petitioner could claim for compensatory damages for his removal — Whether petitioner could claim for back dated remuneration — Whether petitioner could claim for compensation of appointment of additional directors — Whether petitioner could claim for compensatory damages for unnecessary conspiracy suit — Companies Act 1965 s 181

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The petitioner was the 50% de facto owner or ultimate shareholder of the first and second respondents who were nominal defendants in the s 181 action. The petitioner was a director of the first respondent until 29 November 2011. Until 3 February 2012, the petitioner was a director of the second respondent. The petitioner was the second respondent's chief executive officer ('CEO') until his removal on 14 October 2011. The third and fourth respondents were the directors of the first and second respondents. In 2011, the third and fourth respondents caused the first and second respondents to file a Suit No 22NCC-1688–10 of 2011 in the Kuala Lumpur High Court against the petitioner and other parties alleging that the petitioner had breached his fiduciary duties to the first and second respondents and had conspired with the other defendants to injure and cause loss to the first and second respondents ('the conspiracy suit'). In the conspiracy suit, the petitioner filed a counterclaim against the first and second respondents and the third and fourth respondents. In his counterclaim, the petitioner claimed for an order that the third and fourth respondents account for all monies dissipated, benefits and advantage received from the first and second respondents to be assessed and that the second respondent pay to the petitioner the sum of RM1,304,875 for the unlawful termination and/or sacking of the petitioner as its CEO. While the conspiracy suit was on-going before YA Datuk Hasnah bt Dato Mohammed Hashim ('YA Datuk Hasnah'), on 25 April 2012, the petitioner filed the s 181 petition against the respondents. The petition was premised on ten grievances against the third and fourth respondents. Yang Arif Datuk Hasnah on 31 October 2014 dismissed the conspiracy suit and allowed the petitioner's counterclaim. The s 181 petition was heard before YA Datuk Wong who found in favour of the petitioner. YA Datuk Wong found that the other grievances

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were not commercially unfair to the petitioner in his capacity as shareholder of the first and second respondents within the meaning of s 181 of the petition. On 26 May 2016, YA Datuk Wong JC ordered the winding up of the first and second respondents and ordered assessment of damages to be paid by the third and fourth respondents to the petitioner. The petitioner claimed for the 50% of his shares in the respondents' company ('the first head of damages'). Yang Arif Datuk Wong held that the appointment of the third respondent as the second respondent's executive chairman was contrary to the mutual agreement for the petitioner to run the second respondent. Therefore, the third respondent should not have been entitled to be paid the salary and EPF of RM460,000 and RM67,100 respectively as executive chairman ('the second head of damages'). The petitioner filed for assessment of damages against the third and fourth respondents and was heard before the deputy registrar. The petitioner contended that the third respondent had withdrawn all monies totaling to RM415,615.02 from the first respondent's CIMB Bank Rawang Branch account and paid them to himself and his wife as 'back-dated remuneration'. The petitioner contended that there was no basis for such payment as it had been established that the third respondent's wife was not an employee of the first respondent and that the first respondent was only a holding company with no business running ('the third head of damages'). The petitioner claimed for all payments paid to or expenses incurred in the illegal or unlawful appointment of additional directors amounting to a total of RM193,025.70 ('the fourth head of damages'). The plaintiff also claimed for a total of RM1,695,728.10 for payment of legal fees paid to Messrs Bodipalar Ponnudurai De Silva as since YA Datuk Wong had already ruled that there was no grand plan or conspiracy to defraud by the petitioner, thus the commencement of the conspiracy suit was unnecessary, unjustified and a complete waste of funds by the third and the fourth respondents ('the fifth head of damages'). Hence, the petitioner said it was entitled to claim for the sum of RM1,695,728 against the third and the fourth respondents as compensatory damages for the unnecessary conspiracy suit ('the sixth head of damages'). The petitioner also claimed for RM57,269.50 as compensation for the oppression caused by the third and the fourth respondents. The respondents filed appeals against the decisions of the respective judges in the conspiracy suit and the s 181 petition. On 8 September 2016, the Court of Appeal dismissed the respondents' appeals but allowed the respondents' appeal against the petitioner's counterclaim in the conspiracy suit. The Court of Appeal also held that res judicata and estoppel applied in the present case and that YA Datuk Wong was bound by the findings of fact by YA Datuk Hasnah in the conspiracy suit. The petitioner claimed damages in the total sum of RM8,181,281.32.

Held, allowing the petitioner's appeal to the extent of awarding him damages of RM360,062.85 and interest with costs of RM5,000 subject to allocator and allowing the third and fourth respondents' appeal in part:

(1) It was trite law that even though an award of damages was made in favour of the petitioner, he still had the burden of proving that he suffered the losses and damages claimed as a consequence of the proven grievances. It was the petitioner's case that as a result primarily of the dilution of his shareholding in the companies, the value of the petitioner's shares had become zero at the date of winding up of the companies. There was no valuation report to prove what the value of the shares was at the date of winding up of the companies. There was nothing to show that the value of the petitioner's shares was reduced as a result of the dilution of his shareholding. The petitioner had not proved that the dilution of his shares in the companies had resulted in a reduction in the value of his shareholding. The petitioner had not proved that his shares became worthless as a result of the grievances proved by him. The petitioner had not proved the first head of damages (see paras 19 & 24).

(2) For the second head of damages, the petitioner had not proved that he would have been entitled to the sum of money paid to the third respondent as director if he had not been removed as director of the companies. It was not disputed by the petitioner that the petitioner had never been paid director's fee. Instead the agreement was that the petitioner would be paid as the CEO of the second respondent whereas the third respondent would receive director's fees. The petitioner had never been paid directors' fee, as such, he had not suffered any monetary loss in terms of directors' fee as a consequence of his removal as a director of the companies. What the petitioner suffered was the loss of his salary as the CEO of the second respondent but the petitioner was not claiming for that because he had already been awarded compensation in the Industrial Court case against the second respondent where he had obtained an order for damages against the second respondent. Since the second respondent had been wound up, it was assumed that the petitioner would not be paid pursuant to the Industrial Court award. There was a figure mentioned in the petitioner's counterclaim in the conspiracy suit but in the absence of any evidence to support the loss suffered by the petitioner as a result of his termination as CEO of the second respondent, the petitioner should not be awarded anything on such item. Therefore, the petitioner was entitled to a sum of RM263,550 only (see paras 29 & 31–33).

(3) In respect of the sum of RM415,615.02, the petitioner's contention was that the sum ought not to have been paid out to the third respondent and members of his family. It meant that the payment was in breach of the fiduciary duties of the third respondent as a director of the companies and the loss was suffered by the companies and not by the petitioner qua shareholder. It was for the liquidator of the companies to take action to recover the payment. Since the petitioner contended that the companies had no creditors and no outstanding loans or facilities any money

recovered would be paid out to the petitioner in proportion to his shareholding. It was not a loss suffered by the petitioner, as such, the petitioner was not entitled to the third head of damages (see para 46).

(4) For the fourth head of damages, the appointment of additional directors was oppressive to the petitioner. It was not necessarily a wrong to the companies and the companies might not be able to claim the sums paid from the third and fourth respondents. The third and fourth respondents should not have paid out those amounts to the additional directors and if they did not pay those amounts out, the amounts would still be in the companies and the petitioner would have been entitled to 50% of that sum. The petitioner therefore entitled to 50% of the sum paid out, in the sum of RM96,512.85. The petitioner had proved that he was the beneficial owner of 50% of the shareholding in the companies (see para 53).

(5) For the fifth and sixth head of damages for the compensatory compensation in the conspiracy suit, the losses suffered were suffered by the companies and not the petitioner. They were losses incurred in respect of the conspiracy suit and did not form part of the proven grievances in the s 181 petition. They were not incurred because of the removal of the petitioner from management of the companies or the dilution of his shareholding. The petitioner could not allege that because he owned 50% of the shares of the companies, he was entitled to recover 50% of what the companies could recover. It was for the liquidator of the companies to pursue for the recovery of the wasted expenditure, if they were incurred by the third and fourth defendants in breach of their fiduciary duties to the companies. The petitioner could not claim for the losses sustained by the companies and the court made no finding that these expenses were paid out by the third and fourth respondents in breach of their fiduciary duties. The conspiracy suit was not struck out on the basis that it was frivolous or vexatious or an abuse of the process of the court as it was dismissed after a lengthy full trial. It could not be the case that if a company commenced legal action against a party and was unsuccessful in the legal action and incured costs, the directors who caused the company to commence the legal action must in all cases and necessarily was personally responsible for indemnifying the company in respect of the costs incurred (see para 65).

[Bahasa Malaysia summary

Pempetisyen adalah 50% pemilik de facto atau pemegang saham mutlak responden-responden pertama dan kedua yang merupakan defendan-defendan nominal dalam tindakan s 181. Pempetisyen adalah pengarah responden pertama sehingga 29 November 2011. Sehingga 3 Februari 2012, pempetisyen adalah pengarah responden kedua. Pempetisyen adalah ketua pegawai eksekutif ('KPE') responden sehingga pemecatannya

pada 14 Oktober 2011. Responden-responden ketiga dan keempat adalah pengarah-pengarah kepada responden-responden pertama dan kedua. Pada 2011, responden-responden ketiga dan keempat telah menyebabkan responden-responden pertama dan kedua untuk memfailkan Guaman No 22NCC-1688–10 Tahun 2011 di Mahkamah Tinggi Kuala Lumpur terhadap pempetisyen dan pihak-pihak lain dengan mengatakan bahawa pempetisyen telah melanggar kewajipan fidusiarinya kepada responden-responden pertama dan kedua dan telah berkonspirasi dengan defendan-defendna lain untuk menjejaskan dan menyebabkan kerugian kepada responden-responden pertama dan kedua ('guaman konspirasi'). Dalam guaman konspirasi, pempetisyen telah memfailkan tuntutan balas terhadap responden-responden pertama dan kedua dan responden-responden ketiga dan keempat. Dalam tuntutan balasnya, pempetisyen telah menuntut untuk satu perintah agar responden-responden ketiga dan keempat bertanggungjawab untuk semua wang yang telah lesap, manfaat dan kelebihan yang diterima daripada responden-responden pertama dan kedua ditaksir dan agar responden kedua membayar kepada pempetisyen sejumlah RM1,304,875 untuk penamatan yang tidak sah dan/atau memecat pempetisyen sebagai KPEnya. Sementara guaman konspirasi tersebut sedang berjalan di hadapan YA Datuk Hasnah bt Dato Mohammed Hashim ('YA Datuk Hasnah'), pada 25 April 2012, pempetisyen telah memfailkan petisyen s 181 terhadap responden-responden. Petisyen tersebut berpremiskan sepuluh kilanan terhadap responden-responden ketiga dan keempat. Yang Arif Datuk Hasnah pada 31 Oktober 2014 telah menolak guaman kospirasi tersebut dan membenarkan tuntutan balas pempetisyen. Petisyen s 181 telah didengar di hadapan YA Datuk Wong yang mendapati telah menyebelahi pempetisyen. Yang Arif Datuk Wong mendapati bahawa kilanan lain tersebut bukan secara komersial tidak adil kepada pempetisyen dalam kapasitinya sebagai pemegang saham kepada responden-responden pertama dan kedua dalam maksud petisyen s 181 itu. Pada 26 Mei 2016, YA Datuk Wong PK telah memerintahkan penggulungan responden-responden pertama dan kedua dan memerintahkan taksiran ganti rugi dibayar oleh responden-responden ketiga dan keempat kepada pempetisyen. Pempetisyen telah menuntut 50% daripada bahagiannya dalam syarikat responden-responden ('ganti rugi tajuk pertama'). Yang Arif Datuk Wong memutuskan bahawa pelantikan responden ketiga sebagai pengerusi eksekutif responden adalah bertentangan dengan persetujuan bersama untuk pempetisyen mengendalikan responden kedua. Oleh itu, responden ketiga tidak patut layak dibayar gaji dan KWSP sebanyak RM460,000 dan RM67,100 masing-masingnya sebagai pengerusi eksekutif ('ganti rugi tajuk kedua'). Pempetisyen telah memfailkan untuk taksiran ganti rugi terhadap responden-responden ketiga dan keempat dan telah didengar di hadapan timbalan pendaftar. Pempetisyen menegaskan bahawa responden ketiga telah mengeluarkan semua wang berjumlah RM415,615.02 daripada akaun Cawangan Bank CIMB responden pertama dan membayarnya kepada dirinya sendiri dan isterinya sebagai 'back-dated remuneration'. Pempetisyen

menegaskan bahawa tiada asas untuk bayaran sedemikian kerana ia telah dibuktikan bahawa isteri responden ketiga bukan pekerja kepada responden pertama dan bahawa responden pertama hanya syarikat pemegangan tanpa apa-apa perniagaan yang dijalankan ('ganti rugi tajuk ketiga'). Pempetisyen telah menuntut semua bayaran yang telah dibayar kepada atau perbelanjaan yang ditanggung dalam pelantikan yang menyalahi undang-undang dan tidak sah pengarah-pengarah tambahan yang berjumlah keseluruhannya RM193,025.70 ('ganti rugi tajuk keempat'). Plaintif juga telah menuntut sejumlah RM1,695,728.10 untuk bayaran yuran guaman dibayar kepada Tetuan Bodipalar Ponnudurai De Silva oleh kerana YA Datuk Wong telahpun memutuskan bahawa tiada rancangan besar atau konspirasi untuk menipu oleh pempetisyen, oleh itu guaman konspirasi yang dimulakan itu tidak perlu, tidak wajar dan membazir wang oleh responden-responden ketiga dan keempat ('ganti rugi tajuk kelima'). Justeru, pempetisyen mengatakan ia layak terhadap tuntutan untuk jumlah RM1,695,728 terhadap responden-responden ketiga dan keempat sebagai ganti rugi pampasan bagi guaman kospirasi yang tidak perlu itu ('ganti rugi tajuk keenam'). Pempetisyen juga menuntut RM57,269.50 sebagai pampasan kerana penindasan yang diakibatkan oleh responden-responden ketiga dan keempat. Responden-responden telah memfailkan rayuan-rayuan terhadap keputusan hakim-hakim berkenaan dalam guaman konspirasi tersebut dan petisyen s 181. Pada 8 September 2016, Mahkamah Rayuan telah menolak rayuan-rayuan responden-responden tetapi telah membenarkan rayuan responden-responden terhadap tuntutan balas pempetisyen dalam guaman konspirasi itu. Mahkamah Rayuan juga memutusakan bahawa res judicata dan estoperl terpakai dalam kes ini dan bahawa YA Datuk Wong terikat dengan dapatan fakta oleh YA Datuk Hasnah dalam guaman konspirasi itu. Pempetisyen menuntut ganti rugi untuk jumlah keseluruhan RM8,181,281.32.

Diputuskan, membenarkan rayuan pempetisyen setakat mengawardkan kepadanya ganti rugi RM360,062.85 dan faedah dengan kos RM5,000 tertakluk kepada alokatur dan membenarkan sebahagian rayuan responden-responden ketiga dan keempat:

(1) Ia adalah undang-undang lapuk bahawa meskipun suatu award ganti rugi telah dibuat menyebelahi pempetisyen, dia masih mempunyai beban membuktikan bahawa dia telah mengalami kehilangan dan kerugian yang dituntut sebagai akibat pembuktian kilanan tersebut. Ia adalah kes pempetisyen bahawa akibat utama daripada pencairan pegangan sahamnya dalam syarikat, nilai saham pempetisyen menjadi sifar pada masa penggulungan syarikat itu. Tiada apa yang menunjukkan bahawa nilai saham pempetisyen telah dikurangkan akibat pencairan pegangan sahamnya. Pempetisyen tidak membuktikan bahawa pencairan sahamnya dalam syarikat telah mengakibatkan pengurangan dalam nilai pegangan sahamnya. Pempetisyen tidak membuktikan

bahawa sahamnya menjadi tidak bernilai akibat kilanan yang dibuktikan olehnya. Pempetisyen tidak membuktikan ganti rugi tajuk pertama (lihat perenggan 19 & 24).

(2) Untuk ganti rugi kedua, pempetisyen tidak membuktikan bahawa dia mungkin layak mendapat jumlah wang yang dibayar kepada responden ketiga sebagai pengarah jika dia tidak disingkir sebagai pengarah syarikat itu. Ia tidak dipertikaikan oleh pempetisyen bahawa pempetisyen tidak pernah dibayar fi pengarah. Sebaliknya perjanjiannya adalah bahawa pempetisyen akan dibayar sebagai KPE kepada responden kedua manakala responden ketiga akan menerima fi pengaraha. Pempetisyen tidak pernah dibayar fi pengarah, oleh itu, dia tidak mengalami apa-apa kerugian kewangan dari segi fi pengarah akibat penyingkirannya sebagai pengarah syarikat. Apa yang dialami oleh pempetisyen adalah kehilangan gaji sebagai KPE kepada responden kedua tetapi pempetisyen tidak menuntut untuk itu kerana dia telahpun diawardkan pampasan dalam kes Mahkamah Perusahaan terhadap responden kedua di mana dia telah memperoleh perintah untuk ganti rugi terhadap responden kedua. Oleh kerana responden kedua telah digulungkan, ia diandaikan bahawa pempetisyen tidak akan dibayar berikutan award Mahkamah Perusahaan. Terdapat angka yang dinyatakan dalam tuntutan balas pempetisyen dalam guaman konspirasi itu tetapi tanpa kehadiran apa-apa keterangan untuk menyokong kehilangan yang dialami oleh pempetisyen akibat pemecatannya sebagai KPE kepada responden kedua, pempetisyen tidak patut diawardkan apa-apa untuk butiran tersebut. Oleh demikian, pempetisyen layak memperoleh sejumlah RM263,550 sahaja (lihat perenggan 29 & 31–33)

(3) Berhubung jumlah RM415,615.02, hujah pempetisyen adalah bahawa jumlah itu tidak patut dibayar kepada responden ketiga dan ahli keluarganya. Ini bermaksud bahawa bayaran itu melanggar kewajipan fidusiari responden ketiga sebagai pengarah syarikat dan kerugian tersebut dialami oleh syarikat dan bukan pempetisyen sebagai pemegang saham. Ia adalah untuk penyelesai syarikat mengambil tindakan untuk mendapat balik bayaran itu. Oleh kerana pempetisyen menegaskan bahawa syarikat itu tidak mempunyai pemiutang dan tiada baki pinjaman atau kemudahan apa-apa wang yang dapat dikembalikan untuk membayar pempetisyen mengikut bahagian pegangan sahamnya. Ia bukan kerugian yang dialami oleh pempetisyen, oleh itu, pempetisyen tidak layak mendapat ganti rugi tajuk ketiga (lihat perenggan 46).

(4) Untuk ganti rugi keempat, pelantikan pengarah tambahan adalah menindas kepada pempetisyen. Ia tidak semestinya salah untuk syarikat dan syarikat tidak mungkin dapat menuntut jumlah yang dibayar daripada responden-responden ketiga dan keempat. Responden-responden ketiga dan keempat tidak patut membayar

jumlah tersebut kepada pengarah tambahan dan jika mereka tidak membayar jumlah tersebut, jumlah itu masih akan berada dalam syarikat itu dan pempetisyen akan layak mendapat 50% daripada jumlah tersebut. Pempetisyen dengan itu layak mendapat 50% daripada jumlah yang dibayar, berjumlah RM96,512.85. Pempetisyen telah membuktikan bahawa dia adalah pemilik benefisiari 50% daripada pegangan saham dalam syarikat tersebut (lihat perenggan 53).

(5) Untuk ganti rugi kelima dan keenam bagi pampasan dalam guaman konspirasi, kerugian dialami oleh syarikat dan bukan pempetisyen. Ia adalah kerugian yang ditanggung berkaitan guaman konspirasi dan tidak membentuk sebahagian kilanan yang dibuktikan dalam pempetisyen s 181. Ia tidak ditanggung kerana penyingkiran pempetisyen daripada pengurusan syarikat atau pencairan pegangan sahamnya. Pempetisyen tidak boleh mengatakan oleh kerana dia memiliki 50% daripada saham syarikat, dia layak mendapat balik 50% daripada pa yang syarikat boleh mendapat balik. Ia adalah untuk penyelesai syarikat meneruskan pengembalian perbelanjaan yang sia-sia itu, jika ia ditanggung oleh defendan-defendan ketiga dan keempat yang melanggar kewajipan fidusiari mereka kepada syarikat tersebut. Pempetisyen tidak menuntut kerugian yang dialami oleh syarikat itu dan mahkamah tidka membuat dapatan bahawa perbelanjaan tersebut telah dibayar oleh responden-responden ketiga dan keempat yang melanggar kewajipan fidusiari mereka. Guaman konspirasi itu tidak dibatalkan berdasarkan bahawa ia adalah remeh dan menyusahkan atau satu penyalahgunaan proses mahkamah kerana ia telah ditolak selepas perbicaraan penuh yang panjang dan menanggung kos, pengarah-pengarah yang menyebabkan syarikat itu memulakan tindakan undang-undang tersebut hendaklah dalam semua keadaan dan perlu bertanggungjawab secara peribadi untuk menanggung rugi syarikat itu berkaitan kos yang ditanggung (lihat perenggan 65).]

Notes

For cases on appeal against assessment, see 6(1) *Mallal's Digest* (5th Ed, 2015) paras 303–305.

Cases referred to

Giles v Rhind [2003] Ch 618, CA (distd)

Johnson v Gorewood & Co (a firm) [2002] 2 AC 1, HL (refd)

Popular Industries Limited v Eastern Garment Manufacturing Sdn Bhd [1989] 3 MLJ 360, HC (refd)

Legislation referred to

Companies Act 1965 s 181

Goik Kenwayne (Huam Wan Ying with him) (Dennis Nik & Wong) for the petitioner.

Fiona Bodipalar (David Morais with him) (Bodipalar Ponnudurai De Silva) for the respondents.

Wong Chee Lin JC:

[1] There are two appeals before me. In a proceeding filed pursuant to s 181 of the Companies Act 1965, the learned JC Datuk Wong Kian Kheong (as he then was) had ordered compensatory damages to be assessed and paid jointly and severally by the third and fourth respondents to the petitioner. The damages were assessed by the deputy registrar who awarded the sum of RM193,025.70 in favour of the petitioner. The petitioner has appealed against her decision. The third and fourth respondents also appealed. I have allowed the appeal of the petitioner partially and also partially allowed the appeal of the third and fourth respondent. These are the full reasons for my decision.

SALIENT BACKGROUND FACTS

[2] The petitioner is the 50% de facto owner/ultimate shareholder of the first and second respondents who are nominal defendants in the s 181 action.

[3] The petitioner was a director of the first respondent until 29 November 2011.

[4] Until 3 February 2012, the petitioner was a director of the second respondent.

[5] The petitioner was the second respondent's chief executive office ('CEO') until his removal on 14 October 2011.

[6] The third and fourth respondents are the directors of the first and second respondents.

[7] In 2011, the third and fourth respondents caused the first and second respondents to file a Suit No 22NCC-1688–10 of 2011 in the Kuala Lumpur High Court against the petitioner and other parties alleging, inter alia, that the petitioner had breached his fiduciary duties to the first and second respondents and had conspired with the other defendants to injure and cause loss to the first and second respondents ('the conspiracy suit').

[8] In the conspiracy suit, the petitioner filed a counterclaim against the first and second respondents and the third and fourth respondents. In his counterclaim, the petitioner claimed, inter alia, for an order that the third and fourth respondents account for all monies dissipated, benefits and advantage received from the first and second respondents to be assessed and that the second respondent pay to the petitioner the sum of RM1,304,875 for the unlawful termination and/or sacking of the petitioner as its CEO.

[9] While the conspiracy suit was on-going before YA Datuk Hasnah bt Dato Mohammed Hashim ('YA Datuk Hasnah'), on 25 April 2012, the petitioner filed the s 181 petition against the respondents. The petition was premised on ten grievances against the third and fourth respondents.

[10] After going through a lengthy trial, YA Datuk Hasnah on 31 October 2014 dismissed the conspiracy suit and allowed the petitioner's counterclaim.

[11] The s 181 petition was heard before YA Datuk Wong who found in favour of the petitioner on the following grievances:

(a) third grievance: YA Datuk Wong agreed with the petitioner that the third and fourth respondents had ousted the petitioner from the management of the second respondent when they took control of the meeting held on 15 August 2011 and held that that was in breach of their mutual agreement;

(b) fourth grievance: YA Datuk Wong JC agreed with the petitioner that the appointment of additional directors in the first and second respondents was in breach of the third respondent's duties as quasi-partner and the fourth respondent's duties as a trustee;

(c) fifth grievance: YA Datuk Wong agreed with the petitioner that the removal of the petitioner as CEO of the second respondent and director of both the first and second respondents was a breach of the third respondent's duties as quasi-partner and the fourth respondent's duties as a trustee;

(d) sixth grievance: YA Datuk Wong agreed with the petitioner that the removal of the petitioner as a cheque signatory was a breach of the third respondent's duties as quasi-partner and the fourth respondent's duties as a trustee; and

(e) ninth grievance: YA Datuk Wong agreed with the petitioner that the dilution of the petitioner's shares in the first respondent was commercially unfair to and oppressive of the petitioner.

[12] YA Datuk Wong found that the other grievances were not commercially unfair to the petitioner in his capacity as shareholder of the first and second respondents within the meaning of s 181 of the petition.

[13] On 26 May 2016, YA Datuk Wong JC ordered the winding up of the first and second respondents and ordered assessment of damages to be paid by the third and fourth respondents to the petitioner.

[14] The respondents filed appeals against the decisions of the respective judges in the conspiracy suit and the s 181 petition.

[15] On 8 September 2016, the Court of Appeal dismissed the respondents' appeals but allowed the respondents' appeal against the petitioner's counterclaim in the conspiracy suit.

[16] The Court of Appeal also held that res judicata and estoppel applied in this case and that YA Datuk Wong was bound by the findings of fact by YA Datuk Hasnah in the conspiracy suit.

[17] The petitioner has filed for assessment of damages against the third and fourth respondents and this was heard before the deputy registrar.

[18] The petitioner claimed damages in the total sum of RM8,181,281.32 as follows:

No	Particulars	Total amount (RM)	Total claim (RM)	%
1.	Value of the petitioner's 50% shares in the first and the second respondents. Indicative value of ALCIM Group based on the consolidated financial statement as at Financial Year End 2011 (see UHY Report dated 14 December 2016)	7,909,805	3,954,903	50%
2	Compensatory damages for equal payment made/paid to the third respondent from October 2011 to July 2015. (a) Salary paid to Jacob as Chairman (ALCIM Sdn Bhd) — RM460,000 (b) EPF paid to Jacob (ALCIM Sdn Bhd) — RM67,100.	1,864,740	1,864,740	100%

No	Particulars	Total amount (RM)	Total claim (RM)	%
	(c) Directors Fee paid to Jacob (ALCIM Holding) – RM25,000 per month (RM15,000 paid directly to Jacob and RM10,000 paid to Jacob's wife and son) — RM1,141,490. (d) EPF paid to Jacob directly and/or to his wife and son (ALCIM Holding) — RM196,150.			
3	Compensatory damages for equal payment made/paid to the third respondent directly to through his wife.	415,615.02	415,615.02	100%
4	Compensatory damages for all payment paid to and/or expenses incurred in the illegal/unlawful appointment of additional directors: (a) ALCIM Holding Sdn Bhd — RM85,000. (b) ALCIM Sdn Bhd — RM108,025.70.	193,025.70	193,025.70	100%
5	Compensatory damages for wasted and/or unnecessary and/or unjustified legal and counsel fees paid to Messrs Bodipalar Ponnudurai De Silva. (a) Payment from Standard Chartered Bank — RM2,897,616.21. (b) Payment from CIMB Bank – RM493,840.	3,391,456.21	1,695,728.10	50%
6.	Compensatory damages for wasted, rejected and/or unnecessary and/or unjustified reports in KLHC Suit No 22NCC-1688–10 of 2011: (a) Baker Tilly Monteiro — RM37,936; (b) Crowe Horwath — RM21,417;	114,539	57,269.50	50%

No	Particulars	Total amount (RM)	Total claim (RM)	%
	(c) JR Control Risk — RM48,686; and (d) Siaga Informatics — RM6,500.			
TOTAL CLAIM			RM8,181,281.32	

FINDINGS OF THE COURT

[19] It is trite law that even though an award of damages has been made in favour of the petitioner, he still has the burden of proving that he has suffered the losses and damages claimed as a consequence of the proven grievances.

[20] In the case of *Popular Industries Limited v Eastern Garment Manufacturing Sdn Bhd* [1989] 3 MLJ 360 it was held as follows:

> It is axiomatic that a plaintiff seeking substantial damages has the burden of proving both the fact and the amount of damages before he can recover. If he proves neither, the action will fail or he may be awarded only nominal damages upon proof of the contravention of a right. Thus nominal damages may be awarded in all cases of breach of contract (see *Marzetti v William*). And where damage is shown but its amount is not proved sufficiently or at all, the court will usually decree nominal damages ...
>
> ...
>
> In this context, I am reminded of Lord Goddard's dictum in *Bonham-Carter v Hyde Park Hotel* quoted with approval by Thomson CJ in *Lee Sau Kong v Leow Cheng Chiang*, namely, that:
>
> > Plaintiffs must understand that if they bring actions for damages it is for them to prove their damage; it Is not enough to write down the particulars and, so to speak, throw them at the head of the court, saying 'This is what I have lost, I ask you to give me these damages'. They have to prove it.

First head of damages: Value of the petitioner's 50% shares in the first and second respondents (hereinafter the first and second respondents will be referred to as 'the companies')

[21] In support of this head of damage, the petitioner produced a valuation report by UHY FLVS Sdn Bhd which estimated the value of the companies at the sum of RM7,909,805 as at December 2011. A very substantial portion of that sum comprises cash in bank. The petitioner claims 50% of that sum, being RM3,954,903.

[22] The valuation methodology used by the valuer was the asset based method.

[23] The third and fourth respondents have criticised the findings in the valuation report and pointed out various factors which have not been taken into account by the valuer.

[24] It is the petitioner's case that as a result primarily of the dilution of his shareholding in the companies, the value of his shares has become zero at the date of winding up of the companies. However, there is no valuation report to prove what the value of the shares was at the date of winding up of the companies. More importantly, there is nothing to show that the value of the petitioner's shares had been reduced as a result of the dilution of his shareholding. In other words, the petitioner has not proved that the dilution of his shares in the companies had resulted in a reduction in the value of his shareholding. The petitioner has also not proved that his shares have become worthless as a result of the grievances proved by him. If, as alleged by the petitioner, the first respondent is a holding company with no business whilst the second respondent had no creditors, and if it is true that at the time of winding up the first and second respondent's net assets were down to only RM896,772.47 and (-) RM1,621,664.62, there must have been cash depleted by the directors but, as will be elaborated later on, Datuk YA Wong found that dissipation of the company's monies does not constitute oppressive conduct against the shareholder. On this basis, I find that the petitioner has not proved this head of damage. In other words, the valuation report adduced by the petitioner does not prove that the shares of the petitioner have become worthless as a result of the proved grievances in particular, the dilution of the shareholding of the petitioner. As such I do not find it necessary to consider the submissions of the third and fourth respondents as to why the valuation report cannot be relied upon.

[25] I also bear in mind that by claiming the value of his shares as at December 2011, the petitioner is effectively seeking the third and fourth respondents to purchase his shares at the value as at December 2011. YA Datuk Wong had expressly declined to order a share purchase order in the s 181 petition. He said this:

> V1. 'Buy-out' is not appropriate
>
> 149. After considering the Parties' Submission On Remedy, I am unable to accede to the petitioner's first Prayer under s 181(2)(c) CA for the following reasons:
>
> (a) The companies are dormant with no source of income. Any 'buy-out' of the shares in the companies will not be meaningful;
>
> (b) The companies are not listed on Bursa Malaysia whereby it will be easy to ascertain the price of the companies' shares at any point of time.

Accordingly, there are serious problems in ascertaining the value of the companies' shares for the purpose of the proposed 'buy-out' order as follows —

(i) which date should be used to value the share of the companies? I cannot accept 30.6.2011 as the date to value the companies' shares because the first commercial unfairness (third Grievance) occurred at the second respondent's BOD meeting dated 15 August 2011; and

(ii) which competent and independent valuer should be appointed for the purpose of the proposed 'buy-out' order? The parties in this case cannot agree on the appointment of the valuer.

[26] To order the third and fourth respondents to buy out the petitioner would be to grant the petitioner the order which YA Datuk Wong had expressly declined to give.

Second head of damage: Compensatory damages for equal payments made/ paid to the third respondent from October 2011–July 2015

[27] Flowing from the findings of YA Datuk Wong in the third grievance, the petitioner submits, as he was an equal partner with 50:50 shareholding, he is entitled to claim for the following amount:

(a) Salary paid to the third respondent as Chairman of ALCIM Sdn Bhd	RM460,000
(b) EPF contribution paid to the third respondent	RM67,100
(c) Director's fee RM25,000 per month (RM15,000 was paid to the third respondent and RM10,000 was paid to the third respondent's wife and son)	RM1,141,490
EPF contribution paid to the third respondent and/or the third respondent's wife and son	RM196,150

[28] Had it not been for the oppressive conduct of the third and the fourth respondents in removing him from the companies, the petitioner claims that he would have been entitled to the above amount.

[29] I find that the petitioner has not proved that he would have been entitled to the sum of money paid to the third respondent as director if he had not been removed as director of the companies. The third and fourth respondents submit and this is not disputed by the petitioner that the petitioner has never been paid director's fee. Instead the agreement was that the petitioner would be paid as the CEO of the second respondent whereas the third respondent would receive director's fees.

[30] However, YA Datuk Wong held that the appointment of the third respondent as the second respondent's executive chairman was contrary to the mutual agreement for the petitioner to run the second respondent. Therefore, the third respondent should not have been entitled to be paid the salary and EPF of RM460,000 and RM67,100 respectively as executive chairman. That is a wrong done to the petitioner and not to the second respondent so the petitioner should be entitled to claim his 50% portion of that amount, in the sum of RM263,550.

[31] I agree that if the petitioner had never been paid directors' fee, he has not suffered any monetary loss in terms of directors' fee as a consequence of his removal as a director of the companies. What the petitioner suffered was the loss of his salary as the CEO of the second respondent but the petitioner is not claiming for that because he has already been awarded compensation in his Industrial Court case against the second respondent where he had obtained an order for damages against the second respondent. Since the second respondent has been wound up, it stands to reason to assume that the petitioner would not be paid pursuant to the industrial court award. I would have been willing to order the third and fourth respondents to pay that amount awarded to the petitioner. In his grounds of judgment, YA Datuk Wong has said this:

> [157] I do not accept the respondents' contention that since the petitioner has been awarded damages in the conspiracy suit and compensation in the Industrial Court (two earlier compensatory orders), the petitioner will be unjustly enriched by another claim of compensatory damages (assessed in the inquiry). This is because the two earlier compensatory orders are payable by the second respondent and not by the third and fourth respondents personally. As admitted by the respondents' learned counsel, the companies are merely 'shell' companies and most likely, the two earlier compensatory orders may just constitute paper judgments. Accordingly, I do not foresee the petitioner being unjustly enriched by compensatory damages assessed in the inquiry.

[32] However, the petitioner has not adduced any evidence as to what he would have lost as a result of the termination of his employment as CEO of the second respondent. There is a figure mentioned in his counterclaim in the conspiracy suit but in the absence of any evidence to support the loss suffered by him as a result of his termination as CEO of the second respondent, I am unable to award him anything on this item.

[33] Therefore, in respect of this head of damage, I find that the petitioner is entitled to a sum of RM263,550 only.

Third head of damage: Compensatory damages for equal payments made/paid to the third respondent directly or through his wife and son

[34] The petitioner contends that the third respondent had withdrawn all monies totalling to RM415,615.02 from the first respondent's CIMB Bank Rawang Branch account and paid them to himself and his wife as 'back-dated remuneration'.

[35] According to the petitioner, these payments were based on the recommendations of Crowe Howarth's Forensic Audit Report dated 27 November 2012 ('Crowe Howarth's Report'). The Crowe Howarth's Report was referred to in the conspiracy suit. However, it was rejected by the learned YA Datuk Hasnah.

[36] The petitioner contends that there is no basis for such payment as it had been established that the third respondent's wife is not an employee of the first respondent and that the first respondent is only a holding company with no business running.

[37] Therefore, the petitioner claims that the same amount ought to be paid to him being a 50% shareholder of ALCIM Group if not for the removal of the petitioner as the director of the companies and for ousting the petitioner from the management of the second respondent.

[38] In replying to the issue of retrenchment benefits that was raised in the submission of the third and the fourth respondents, the petitioner submits that if it was not for the petitioner's removal, the petitioner would have been entitled to the same benefit for the sum of RM112,060.94 as a 50:50 equal partner.

[39] The third and the fourth respondents dealt with the amount of RM415,615.02 as claimed by the petitioner in two instances.

[40] In the first instance, the amount of RM203,554.08 were payments made to the third respondent and his wife from the first respondent's account in CIMB Rawang Branch and these payments were part of the seventh grievance that was rejected by the court. The petitioner is therefore precluded form claiming the same as it does not form part of the proven grievances.

[41] The other part of the petitioner's claim amounting to RM212,060.94, the third and the fourth respondents submit that the first RM100,000 was a

repayment of an interest free loan that the third respondent extended to the second respondent in April 2013. This can be seen in exh JG6 of the third respondent's affidavit.

[42] The balance of RM112,060.94 was compensation that the third respondent received as retrenchment benefit. This benefit was paid to all staffs as part of the retrenchment exercise. The third and the fourth respondent submit that the petitioner is not entitled to this payment as it is not a loss suffered as a result of the proven grievances.

[43] The third and the fourth respondents further submit that, even if the petitioner was employed as CEO of the second respondent, he would not have received the retrenchment benefit as it is not payable under his contract. A copy of the petitioner's employment contract is shown in exh JG7 of the third respondent affidavit.

[44] In replying to the issue of Crowe Howarth's Forensic Audit Report dated 27 November 2012, the third and the fourth respondents submit that the report was not referred to in the conspiracy suit but in the oppression action. Therefore, the petitioner's submission in this matter is incorrect.

[45] The wrongful withdrawals from the CIMB Bank Rawang Branch account form part of the grievance raised by the petitioner in the s 181 petition. This is what YA Datuk Wong said about this grievance:

> [105] ... The thrust of the second grievance is that the third and fourth respondents, as the second respondent's directors, have breached their fiduciary and statutory duties owed by the third and fourth respondents to the second respondent in failing to stop the payment of RM672,000 (for services which had not been provided by the first respondent). The seventh grievance avers that the third and fourth respondents have dissipated companies funds. In my view, the seventh grievance concerns breaches of fiduciary and statutory duties owed by the third and fourth respondents to the companies. I am of the opinion that the second and seventh grievances adversely affect the companies and do not adversely affect the petitioner as a member of the first respondent. As held in Pan Pacific Construction Holdings Sdn Bhd and Jet-Tech Materials Sdn Bhd an act or omission is only actionable under s 181 CA if the act or omission adversely affects the plaintiff in a commercially unfair manner as a shareholder of the company in question. The Federal Court decided in Koh Jui Hiong at p 444 that s 191 of the CA *would have been abused if the nature of the complaint is misconduct rather than mismanagement.*

[46] In respect of this sum of RM415,615.02, the petitioner's contention is that the sum ought not to have been paid out to the third respondent and members of his family. This means that the payment was in breach of the fiduciary duties of the third respondent as a director of the companies and the loss is suffered by the companies and not by the petitioner qua shareholder. It

is for the liquidator of the companies to take action to recover the payment. Since the petitioner has contended that the companies have no creditors and no outstanding loans or facilities any money recovered would be paid out to the petitioner in proportion to his shareholding. It is not a loss suffered by the petitioner and I find that the petitioner is not entitled to this head of damage.

Fourth head of damages: Compensatory damages for payments paid to and/or expenses in relation to unlawful appointment of additional directors

[47] The petitioner claimed for all payments paid to and/or expenses incurred in the illegal or unlawful appointment of additional directors amounting to a total of RM193,025.70 being RM85,000 in the first respondent and RM108,025.70 in the second respondent.

[48] The third and the fourth respondents had unlawfully appointed additional directors and removed the petitioner as a director. YA Datuk Wong, in this regard, had found this unlawful appointment of additional directors had breached the 'quasi-partnership' between the petitioner and the third respondent. He had also found that the third and the fourth respondents had breached the fiduciary duty to act in good faith towards the petitioner.

[49] Following this, the petitioner submits that the third and the fourth respondents must be jointly and severally responsible for the monies paid to these unlawful additional directors.

[50] The third and the fourth respondents submit that the petitioner is not entitled to claim for these amount as these were payments made by the companies to the additional directors although YA Datuk Wong had found that the appointment of the additional directors to be unlawful.

[51] Furthermore, the third and the fourth respondents stress that the petitioner would not have received these monies even if the additional directors were not appointed.

[52] The deputy registrar found in favour of the petitioner and awarded the sum of RM193,025.70 in favour of the petitioner.

[53] I agree with her. The appointment of additional directors is oppressive to the petitioner. It is not necessarily a wrong to the companies and the companies may not be able to claim the sums paid from the third and fourth respondents. The third and fourth respondents should not have paid out those amounts to the additional directors and if they did not pay those amounts out, the amounts would still be in the companies and the petitioner would have been entitled to 50% of that sum. I accordingly find that the petitioner is

entitled to 50% of the sum paid out, in the sum of RM96,512.85. The third and fourth respondents have disputed the shareholding of the petitioner in the companies but I am satisfied that the petitioner has proved that he is the beneficial owner of 50% of the shareholding in the companies. Justice Hasnah at p 33 of Her Ladyship's judgment held that:

> 'Based on the Trust Deeds, both Jacob and Toralf are the de-facto owners of the Plaintiffs on 50-50 equal shareholding. Rozilah is merely a trustee in equal shares …'

YA Datuk Wong in para 137 of His Lordship's judgment held that:

> 137. I am not able to accept the respondents' above contentions because …
>
> (a) …
>
> (b) the increase in the first respondent's paid-up share capital does not reflect the 'quasi-partnership' nature of the first respondent whereby the petitioner and the third respondent are equal 'partners' and the fourth respondent only holds the fourth respondent's shares in trust equally for the petitioner and the third respondent.

Fifth head of damages: Compensatory damages for wasted and/or unnecessary and/or unjustified legal and counsel fees paid to Messrs Bodipalar Ponnudurai De Silva; and

Sixth head of damages: Compensatory damages for wasted, rejected and/or unnecessary and/or unjustified reports in KLHC Suit No 22NCC-1688–10 of 2011

[54] Under the fifth head of damages, the plaintiff claims for a total of RM1,695,728.10 for payment of legal fees paid to Messrs Bodipalar Ponnudurai De Silva ('Bodipalar').

[55] The plaintiff submits that since YA Datuk Wong had already ruled that there was no grand plan or conspiracy to defraud by the petitioner, thus the commencement of the conspiracy suit was unnecessary, unjustified and a complete waste of funds by the third and the fourth respondents.

[56] Hence, the petitioner says it is entitled to claim for the sum of RM1,695,728 against the third and the fourth respondents as compensatory damages for the unnecessary conspiracy suit.

[57] The third and the fourth respondents state that the petitioner's claim under this heading should not be allowed because legal fees does not form part of the grievances awarded by the court.

[58] The petitioner had also withdrawn the seventh grievance which included payments made to lawyers and experts and further submits that the

companies had to use up the monies in order to defend the companies and their interest and these monies were not used by the third and the fourth respondents personally.

[59] In relation to the sixth head of damages above, the plaintiff claims for payments made for the unjustified reports prepared by the following parties and used by the third and the fourth respondents:

(a) Baker Tilly Monteiro — RM37,936;

(b) Crowe Howarth — RM21,417;

(c) JR Control Risk — RM46,686; and

(d) Siaga Informatics — RM6,500.

[60] Since YA Datuk Hasnah had rejected the evidence of these experts and both, YA Datuk Hasnah and YA Datuk Wong, had found that there was no conspiracy by the petitioner, the reports were unnecessary and a waste of funds.

[61] The petitioner further submits that if monies were not spent, the company would have been able to distribute these monies to its shareholder.

[62] Thus, the petitioner claims for RM57,269.50 as compensation for the oppression caused by the third and the fourth respondents.

[63] In justifying the payments made to the experts for preparation of various experts' reports, the third and the fourth respondents submit the companies had engaged with the forensic experts in order to defend the companies and their interest and not for the personal benefit of the third and the fourth respondents.

[64] The deputy registrar found that the claim for wasted legal fees does not form part of the proven grievances in the s 181 petition and that it was natural for a company to engage experts and to obtain reports to defend in legal suit.

[65] I agree that the petitioner should not be entitled to those heads of damages. The losses suffered were suffered by the companies and not the petitioner. They were losses incurred in respect of the conspiracy suit and did not form part of the proven grievances in the s 181 petition. In other words, they were not incurred because of the removal of the petitioner from management of the companies or the dilution of his shareholding. Furthermore, the losses were incurred by the companies and not the petitioner. The petitioner cannot allege that because he owns 50% of the shares of the companies, he is entitled to recover 50% of what the companies can recover. Again, it is for the liquidator of the companies to pursue for the recovery of the

wasted expenditure, if they have been incurred by the third and fourth defendants in breach of their fiduciary duties to the companies. The petitioner cannot claim for the losses sustained by the companies. I make no finding that these expenses were paid out by the third and fourth respondents in breach of their fiduciary duties. The conspiracy suit was not struck out on the basis that it is frivolous or vexatious or an abuse of the process of the court. It was dismissed after a lengthy full trial. It cannot be the case that if a company commences legal action against a party and is unsuccessful in the legal action and incurs costs, the directors who caused the company to commence the legal action must in all cases and necessarily be personally responsible for indemnifying the company in respect of the costs incurred.

[66] In the premises, I find that the petitioner is entitled to damages of RM360,062.85 with interest at the rate of 5%pa from date of order for assessment of damages until date of payment.

[67] In conducting this exercise, I bear in mind the difference between a loss suffered by the company and a loss suffered by the shareholder personally. In the case of *Johnson v Gorewood & Co (a firm)* [2002] 2 AC 1, it was held that the proper plaintiff to sue for reflective loss is the company itself and not its shareholders:

> Where a company suffers loss caused by a breach of duty owed to it, only the company may sue in respect of that loss. No action lies at the suit of a shareholder suing in that capacity and no other to make good a diminution in the value of the shareholder's shareholding where that merely reflects the loss suffered by the company. A claim will not lie by a shareholder to make good a loss which would be made good if the company's assets were replenished through action against the party responsible for the loss, even if the company, acting through its constitutional organs, has declined or failed to make good that loss.

[68] An exception to that principle was carved out in *Giles v Rhind* [2003] Ch 618 where Lord Millet said (at para 34):

> One situation which his not addressed in (*Johnson*) is the situation in which the wrongdoer by the breach of duty owed to the shareholder has actually disabled the company from pursuing such cause of action as the company had. It seems hardly right that the wrongdoer who is in breach of contract to a shareholder can answer the shareholder by saying the company had a cause of action which it is true I prevented it from bringing, but that fact alone means that I the wrongdoer do not have to pay anybody.

[69] However, that exception does not apply in this case because there is nothing to stop the liquidator of the companies from taking any necessary action to recover monies that may have been improperly siphoned off by the third and fourth respondents. There is no evidence to show that the liquidator

will not be in a position to make claims against the third and fourth respondents. Accordingly, where the loss is suffered by the companies, it is for the liquidator to claim against the third and fourth respondents.

[70] In the premises, I allow the petitioner's appeal to the extent of awarding him damages of RM360,062.85 and interest with costs of RM5,000 subject to allocator and I allow the third and fourth respondents' appeal partially in, inter alia, reducing the sum payable for the appointment of additional directors. There will be no order as to costs.

Petitioner's appeal allowed to the extent of damages of RM360,062.85 and interest with costs of RM5,000 subject to allocator, and allowing the third and fourth respondents' appeal in part.

Reported by Mohd Kamarul Anwar